No. 75-616

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In the Supreme Court of the United States

OCTOBER TERM, 1975

VILLAGE OF ARLINGTON HEIGHTS, ET AL.,
Petitioners,

vs.

METROPOLITAN HOUSING DEVELOPMENT CORPORATION, ET AL.,
Respondents,

NORTHWEST OPPORTUNITY CENTER and ELUTERIA D. MALDONADO,
Intervening Respondents.

BRIEF FOR THE RESPONDENTS

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NORTHWEST OPPORTUNITY CENTER and ELUTERIA D. MALDONADO,
Intervening Respondents.

BRIEF FOR THE RESPONDENTS

QUESTION PRESENTED

Whether petitioners' refusal to permit construction of a racially integrated private housing development in a racially segregated area violates respondents' rights under the Fourteenth Amendment and the Fair Housing Act, 42 U.S.C. §§3601 *et seq.* and Civil Rights Act, 42 U.S.C. §§1981-1982 and 42 U.S.C. §1983, where the refusal has the effect of perpetuating racial segregation and is not justified by a compelling public interest.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutes and Constitutional provisions set forth in Appendix A of petitioners' brief, this case involves Section 817 of the Fair Housing Act of 1968 (42 U.S.C. §3617); which provides:

> "42 U.S.C. §3617. Interference, coercion, or intimidation; enforcement by civil action.
>
> It shall be unlawful to coerce, intimidate, threaten or interfere with any persons in the exercise or enjoyment of, or on account of his having aided or encouraged any other person in his exercise or enjoyment, of any right granted or protected by §§3603, 3604, 3605 or 3606 of this title. This section may be enforced by appropriate civil action. (Apr. 11, 1968, PL 90-284, Title VIII, §817, 82 Stat. 85)."

STATEMENT OF THE CASE

Over five years have now passed since Respondent Metropolitan Housing Development Corporation ("MHDC") undertook to develop Lincoln Green and thereby provide 190 units of high-quality, integrated housing in one of the nation's fastest growing and most racially segregated suburban areas. In blocking this private effort to create an integrated community in Arlington Heights, petitioners have prevented "the only present hope of . . . even a small contribution toward eliminating the pervasive problem of segregated housing" (517 F.2d 409, 415).* Petitioners have sought to justify that action by a series of misstatements and exaggerations and by the totally unfounded claim that permitting the development of Lincoln Green would somehow undermine zoning in other municipalities throughout the country.

Contrary to Arlington Heights' repeated assertions, its zoning has no integrity and has *not* been consistently applied. Its use of zoning powers to obstruct Lincoln Green has *not* been found to satisfy even traditional zoning criteria (517 F.2d 409, 412, 415). Contrary to Arlington Heights' repeated assertions, it is *not* being asked to take any affirmative steps to construct, or plan for, or promote housing of any kind, but rather to stop "preventing or interfering with the housing proposed by Metropolitan Housing" (517 F.2d 409, 411). Contrary to Arlington Heights' assertions, its violation of respondents' constitutional and civil rights was not demonstrated *solely* by the greater impact of the action on blacks than whites, but rather by this established fact in the context of a thorough record showing petitioners' overall exploitation of local segregated housing patterns (517 F.2d 409, 412-415). In short, Arlington Heights' blithe assurances that its rejection of Lincoln Green was motivated solely by a concern for neighboring property values and the alleged "integrity" of its zoning plan simply cannot justify the racially discriminatory effects of that action by a municipality whose spectacular growth has been limited to whites, whose segregated housing stock is the most exclusionary in the Chicago area, and whose zoning plan has been amended dozens of times to permit development of thousands of high-rent apartments adjacent to single-family neighborhoods (Ps. Ex. 52, App. II 114, D. Ex. 11, App. II 118).

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* The court of appeals decision is attached to the Petition for Certiorari herein as Appendix A and references thereto are set forth as "517 F.2d ....."; the district court decision is attached to such petition as Appendix B and references thereto are set forth as "373 F. Supp. .....". Relevant pleadings, motions, and interlocutory orders are contained in the agreed to Appendix, Volume I, and references thereto are set forth as "App. I .....". Exhibits are contained in an Appendix, Volume II, Exhibits, and references thereto are set forth as "App. II .....". References to trial transcripts and exhibits offered by the parties at trial are set forth respectively as, "Tr. .....", "Ps. Ex. .....", and "Ds. Ex. .....".

The Denial of the MHDC Application

On January 29, 1971, MHDC formally petitioned the Village of Arlington Heights, Illinois, to rezone a 15 acre parcel of vacant land in Arlington Heights on which MHDC proposed to build "Lincoln Green," a development of 190 townhouse apartments for low and moderate income persons (App. A3; Ps. Ex. 42). The petition was referred to the Plan Commission of Arlington Heights, which held public hearings on the proposed development on March 3, April 21, and June 16, 1971 (Ps. Ex. 17). At these hearings, MHDC presented extensive testimony and documentary evidence on Lincoln Green, all of which was before the Arlington Heights Board of Trustees when it voted to reject MHDC's proposal on September 28, 1974, and much of which was introduced at the trial below that resulted from the Trustees' decision.

The Background of MHDC and Its Involvement With Lincoln Green.

MHDC was organized by the Leadership Council For Metropolitan Open Communities (Tr. 270)* in 1968 as an

* The Leadership Council is a Fair Housing organization whose Board of Directors consists of business and community leaders and includes on the board: Thomas G. Ayers, Chairman, Commonwealth Edison Company; Frederick Jaicks, Chairman, Inland Steel Company; Edwin C. Berry, Johnson Products; Donald Graham, Chairman, Continental Illinois Bank; His Eminence John Cardinal Cody, Archbishop of Chicago; James Cook, President, retired, Illinois Bell Telephone; Ben W. Heineman, Chairman, Chicago Northwestern Railway; Robert S. Ingersoll, Chairman, Berg-Warner; William A. Lee, President, Chicago Federation of Labor and Union Council; C. Virgil Martin, Chairman, Carson Pirie Scott & Co.; The Rt. Rev. James Montgomery, Coadjutor Bishop of the Episcopal Diocese of Chicago; Dawn C. Netsch, Prof., Northwestern University, School of Law; Leonard Spacek, Chairman, Arthur Anderson & Co.; Julian Levy, Professor of Law, University of Chicago Law School. (Ps. Ex. 39).

Illinois not-for-profit corporation (App. I 64) for the purpose of developing housing in the Chicago metropolitan area (517 F.2d 409) for minorities particularly in nonghetto areas where such housing is not available to minorities. (Tr. 229).*

A 99-year lease and an accompanying agreement of sale entered into between the Clerics of St. Viator and MHDC specifically provided that the development would be built for low and moderate income persons under Section 236 of the National Housing and Urban Development Act of 1968 (12 U.S.C. §1715z-1), a program under which the fed-

* MHDC has developed scores of apartments and houses which have been made available to minorities under federal subsidy programs and has purchased and rented individual homes to minority families, all in suburban locations away from areas of minority concentration (Tr. 25, 26, 229-230, 263-267). MHDC's method of marketing and the purpose of the corporation insure that such housing is made particularly available to minority families (Tr. 45, 229). Thus, for example, at MHDC's multi-family development in Palatine Township, 12 families in the first 40 rentals, or 30 percent, were minorities, even though the population of the surrounding area is overwhelmingly white (Tr. 251). The Board of Directors of MHDC includes business and community leaders: Marvin Chandler, President, Chairman, Northern Illinois Gas Company; Milton O. Davis, Director Urban Development, Hyde Park Bank and Trust Company; Milton Fisher, esq., Mayer, Brown & Platt; Ross J. Beatty, McCormick Estates; Marvin Gavin, Regional Attorney, Department Health, Education and Welfare; Gordon J. Gilkey, Vice President, Carson Pirie Scott & Company; Warren G. Skoning, Vice President Real Estate and Property, Sears-Roebuck; W. D. Wilson, Illinois Bell Telephone; Raoul B. Yochim esq., Montgomery Ward & Co.; Elzie Higgenbottom, Asst. Vice President, Mortgage Department, Baird & Warner Real Estate Co.; John G. McKnight, Center for Urban Studies, Northwestern University; James W. Parker, Jr., Compliance officer, Atomic Energy Commission; Myron Reznick, Allstate Insurance.

eral government provides non-profit corporations like MHDC with subsidies in the form of reduced finance charges for the construction of rental units.* The savings are passed on to the apartment residents in the form of reduced rents, which are approximately two-thirds of the rents charged in comparable commercial properties. To insure that the program benefits low and moderate income persons, prospective tenants must meet certain eligibility requirements based on their income and family size that are established specifically by HUD (Tr. 43-44; Ps. Ex. 24). For example, the established income limitation at the time for a one-person family was $7,250 per year; for three-and-four-person families, $10,350; for five-and-six person families, $11,950; and for families of seven or more, $13,450 (*id*).

The Lincoln Green Proposal: Location, Architecture, and Land Planning.

The 15 acre site chosen for Lincoln Green is bounded on the north and west by undeveloped St. Viator property, on the east by single family homes, and on the south by Euclid Avenue, across which are single-family homes (517 F.2d 409, 411).** It is well located with respect to the central business district of Arlington Heights and is readily accessible to schools, shopping and recreation facilities, transportation, and employment opportunities (Tr. 360-63, 394; Ps. Ex. 11, pp. 4-5 and Ps. Ex. 53).

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* In 1974 Congress passed the Housing and Community Development Act which provides subsidies for rents under Section 8 of the act. Pub. L. No. 93-383; 88 Stat. 633; 42 U.S.C. §§5301 *et seq.*

** Thus, while the entire Viatorian property, including the three story novitiate communal living facility and high school, has always been zoned "R-3", much of it is vacant and petitioners' assertion that all the land surrounding the subject property is zoned and developed for R-3 single-family use (Pet Br. 4) is wrong.

After the contracts for the Viatorian land had been executed, MHDC assembled a group of experts, including an architect, engineer, planners, and other housing consultants, to design a development for that site (Tr. 235). Many of those involved were chosen because they had special expertise in designing and planning high quality housing for low and moderate income persons (Tr. 235-36, 342-46).

The architectural plans for Lincoln Green (Ps. Ex. 7) called for 190 units in clusters of single-family attached townhouses of two stories or less with separate entrances and private patios, designed to harmonize with the desirable features of the landscape and the single-family homes to the east (Tr. 236-39; Ps. Ex. 11, p. 5; App. I 66-67).* The development was to be screened or "buffered," from the adjacent homes by trees and plants (App. I 66-67), and more than 60% of the property was to be maintained as open space, with the Lincoln Green townhouses accounting for a relatively smaller land coverage than the single-family houses to the east (*id.;* Ps. Ex. 11, p. 7; Tr. 377-78). Although Arlington Heights' multi-family zoning classification ("R-5") would permit 17 units to the acre (Tr. 878), the 190 townhouses planned for Lincoln Green amounted to less than 13 units to the acre (App. I 66-67).

Physically, the Lincoln Green units were "in many respects . . . quite similar to the single-family detached dwellings; the only salient difference being that the single-family detached dwellings are separated by narrow

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* The architectural plans were admitted as Ps. Ex. 5 (App. I 77). The buildings would cover only 12% of the land (App. I 66) while the land coverage of surrounding homes would be much greater (App. II 113).

yards.* The kind of housing provided in each is essentially the same. The relationship of each to its neighbors is essentially the same—both have direct access to yards and the street; neither uses common entrances or halls." (Ps. Ex. 11, pp. 5-6). According to the Court of Appeals: "Lincoln Green will not be a high-rise development, but merely a cluster of two-story townhouses no higher than the surrounding single family homes" (517 F.2d 409, 419).

Although similar to neighboring houses in all material, physical respects, the Lincoln Green proposal could not be built unless it was zoned for multi-family purposes. As two members of the Arlington Heights Plan Commission noted:

> In the Village Code, there is no separate classification for townhouse development. Therefore, it of necessity accepts the classification of R-5. The proposal in no way approaches the density, architecture, or other characteristics of R-5. Professional planners designate townhouse construction of this nature akin to R-3 rather than R-5. The Lincoln Green proposal suffers from the lack of a separate classification in our ordinance (Ps. Ex. 43, p. 4).

Among the experts assembled by MHDC to work on the Lincoln Green proposal was Norman Drummond, a professional land planning consultant with special experience in developing subsidized housing (App. I 66-67; Tr. 240, 343-46). Mr. Drummond prepared a series of planning and zoning reports on the proposed development (Ps. Ex. 11, 12, 31, 32, 33 and 34), the principal conclusions of

* The map of the area introduced as an exhibit shows graphically how similar Lincoln Green is to surrounding properties in land coverage. There would in fact be much more open space in Lincoln Green (Ps. Ex. 51, App. II 113).

which were that the 15 acre parcel was best suited for R-5 zoning and that Lincoln Green was needed in Arlington Heights and was compatible with the single-family homes to the east and the overall zoning and apartment policies of Arlington Heights.

To determine what impact Lincoln Green would have on the revenues and expenditures of Arlington Heights and its schools, a tax impact study was prepared by MHDC (Tr. 243-47). As church land, of course, the Viatorian property had not previously been subject to taxation at all. The conclusions of the study were that the proposed development would make a net contribution to the Village and to the Arlington Heights schools (517 F.2d 409, 410, 411, Ps. Ex. 26, p. 5, Ps. Ex. 17 at 3 and 4).*

MHDC also contracted with Barton-Ashman Associates, Inc., a consulting firm specializing in traffic and urban planning, to do a study of the traffic and related problems that might be generated by Lincoln Green (Tr. 239). That study (Ps. Ex. 13) was completed in March 1971 and concluded that "the proposed development is expected to have a relatively minor impact on traffic in the vicinity of the site." (*id.*, p. iv). There would be better traffic control within the development than could be provided in a single-family subdivision (Tr. 380-81).

* Per-pupil revenues generated by Lincoln Green would be greater than if the site were developed for single-family use, and school officials testified that the MHDC proposal would cause no serious difficulty in terms of school capacity (Ps. Ex. 17 at 5-6). In addition, reports by Arlington Heights officials showed the adequacy of water and sewer facilities and fire protection (Pl. Ex. 15), and there would be no significant increase in the use of neighborhood parks and playgrounds because of the play areas and substantial amounts of open space retained on the site.

MHDC had consulted with the staff of the Village for preliminary reviews of the proposed development. In every instance in which changes were recommended by the staff, they were incorporated into the Lincoln Green plans (App. I-67; Ps. Ex. 15). Additional questions raised at the Plan Commission were promptly resolved by MHDC.* As the District Court found, MHDC "took the necessary administrative steps to obtain rezoning and made various changes in its proposal in an attempt to satisfy various objections which were raised by the Village's Plan Commission" (373 F.Supp. 208, 210).

The Need for Low and Moderate Income Housing and the Availability of Market Housing

In addition to being designed and planned in the most professional manner, the 190 units to be provided by Lincoln Green would begin to respond to a desperate and growing need for low and moderate income housing, especially for non-white persons, in Arlington Heights and the surrounding northwest Cook County area. Arlington Heights has recognized this need.** Indeed, MHDC's decision to develop subsidized housing on the Viatorian

* For example, when some concern was expressed regarding subsequent control and management of the development, the Board of Directors of MHDC secured offers to manage Lincoln Green from leading real estate firms and passed resolutions confirming that MHDC would retain permanent control of the property and that a citizens' advisory board selected by the Mayor of Arlington Heights would participate in its planning and management (App. I 68; Ps. Ex. 20 and 35; see also Ps. Ex. 21, 22, and 27).

** Petitioners have recommended development of 150 to 250 units of moderate income housing and 50 units of low income housing in Arlington Heights (App. I 68). At the public hearings, even the principal spokesmen opposing Lincoln Green conceded that there was a need in Arlington Heights for such a development (Ps. Ex. 43, pp. 3-4).

property was based on studies confirming the fact that the tremendous recent growth in population and employment in the northwest suburbs of Chicago had created a strong demand there for moderate priced and lower priced housing (Tr. 308).* As the Court of Appeals noted, Lincoln Green "would have been the only subsidized housing in Arlington Heights despite a great demand for such housing in that area" (517 F.2d 409, 411).

Petitioners have, however, rezoned 60 parcels of land in Arlington Heights for large commercial multi-family projects (*e.g.*, Ds. Ex. 10 and 11), 53 of which are adjacent on at least one side to single-family homes (Ps. Ex. 12 and 52). As a result, there were some 5,239 market-rent apartments in Arlington Heights in 1970 (Tr. 692); zoning existed for thousands more (Pet. Br. 4, 6).** How-

* In June 1970, for example, the Institute of Urban Life prepared a study designed to provide a conservative estimate of the demand for such housing among families with annual incomes below $7,000 and concluded that a "floor quantity" estimate of effective demand in the area amounted to 2,600 low income families and 2,850 moderate income families (Ps. Ex. 18, pp. 1-3, 19-20). MHDC also conducted its own market survey to determine the number of persons in the immediate Arlington Heights area whose incomes would qualify them for residency in Lincoln Green and determined that the local demand for low and moderate income housing could fill Lincoln Green many times over (Ps. Ex. 10; Tr. 256-59, 294-96).

** Petitioners have approved rezonings for over 90% of the apartment developments that market-rate developers have proposed to build in Arlington Heights and specifically have permitted multi-family uses adjacent to every high school except St. Viator's (Ds. Ex. 10; Ps. Ex. 33). All proposals for subsidized housing have been rejected (Ds. Ex. 10, #21 and #23; Tr. 853). While the Court of Appeals noted that this evidence did not "necessitate" a finding of discriminatory administration of the zoning ordinance, it did find, contrary to petitioners' favorite misstatement, that Arlington Heights had not been applying its zoning ordinance consistently.

ever, the minimum monthly rent of all of these multi-family units was so high that no low income person could afford them, and there were no three- or four-bedroom units available that even moderate income people can afford (Tr. 777-78, 479-80, 489-90). Indeed, the supply of available low and moderate income housing in Arlington Heights was actually declining (Tr. 483-84; also see Ps. Ex. 18, p. 19).

Residential Segregation in the Arlington Heights Area

As the Court of Appeals noted, there is a high degree of racial segregation in the Chicago metropolitan area. Specifically, the massive growth in population in Arlington Heights in the past two decades* has, with rare exceptions, been limited to whites. Of Arlington Heights 1970 population of 64,884, 27, or less than 0.1 percent, were black (App. I 68; Tr. 549-50, 597). Arlington Heights is the most residentially segregated community and has the most racially exclusionary housing stock in the Chicago metropolitan area among the municipalities with more than 50,000 residents (Ps. Ex. 50, Tr. 575).**

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* Arlington Heights' population in 1950 was 8,768 (App. I 68) and in 1960 was 27,878 (App. I 68). At the trial in January 1974 the Village Planner estimated the Village's population to be 72,000 (Tr. 692).

** Respondents' Exhibit 50, prepared by demographer and urbanologist Pierre de Vise, shows the total 1970 population of municipalities in the Chicago SMSA with more than 50,000 people and the actual number and percentage of Negroes in each of these cities. It also contains Professor de Vise's estimate of the "potential" black population of each of these municipalities, based on the type and cost of housing in each, showing that the housing stock in Arlington Heights is the most racially exclusionary among these cities. Since the housing studied is, of course, presently occupied, this exhibit does not indicate that 3,244 blacks could presently and "automatically" be housed in Arlington Heights as petitioners imply. "It is strictly a hypothetical exercise, attempting to measure the importance of type and cost of housing in explaining the incurable segregation of blacks in the metropolitan area." (Tr. 607, 608) What it does is show that *if* there had been no racial discrimination in Arlington Heights and *if* the housing choice of blacks were based on cost alone, 5% of the existing housing stock of the Village would be occupied by blacks (Tr. 583), a figure lower than any of the other cities in the SMSA, but nevertheless an increase of over 100 times the present number of black residents in the Village (Ps. Ex. 50).

(Footnote continued)

A similar pattern of growing residential segregation has developed in the four-township northwest Cook County area of which Arlington Heights is a part. From 1960 to 1970, the population of this area increased by 219,000 people, only 170 of whom were black; the percentage of blacks in the area actually fell (Tr. 533-4, 606).*

The virtually all white growth patterns of Arlington Heights and its surrounding area contrast dramatically with the figures for the overall Chicago metropolitan area, in which the number and percentage of blacks rose substantially during the 1960's (Tr. 554-55). While their numbers grew, however, almost all minority persons in the Chicago area were still confined to segregated Chicago neighborhoods in 1970 (Tr. 545-46).

As the Court of Appeals observed, the devastating impact on minorities reflected by these statistics can be fully appreciated only in the context of the shift in employment

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(Footnote continued)

* Most of these black workers (108), like Respondent Arthur Guthrie, live in and commute from Chicago (Tr. 529, 207, 218), and most of them, like Respondents Guthrie and Willie Ransom, work at the Honeywell Plant (Tr. 321, 208, 215, 318-19). None of the black workers at Honeywell has been able to find housing he can afford in Arlington Heights (Tr. 321-22, 220-22).

opportunities during the same period. While the City of Chicago lost 230,000 jobs, the number of jobs in the four-township Arlington Heights area rose from 100,000 to 200,000 (517 F.2d 409, 417 fn. 2).

As job opportunities have moved out of Chicago, the difficulties of blacks in finding and holding these jobs have increased (See Ps. Ex. 44 and 46; Tr. 504). In 1970, only 137 of the 13,000 people who worked in Arlington Heights were black, reflecting the fact that black workers cannot find affordable housing there.*

The relocation of jobs to Arlington Heights and the severe problems created because of the segregated housing market for both minority workers and firms seeking to hire them have been documented in a number of reports, including a study issued by the Cook County Office of Economic Opportunity, at the time of the first hearings on Lincoln Green (Ps. Ex. 44). As the Court of Appeals noted, this study confirmed that almost all of the black workers in Arlington Heights resided in Chicago and that the main problem Arlington Heights' employers faced in hiring minorities was the lack of adequate housing within a reasonable distance of their plants (517 F.2d 416, 417).*

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* Among the major conclusions reached by this OEO study on Arlington Heights were (Ps. Ex. 44, pp. 12-14):

7. Transportation—Time and Costs:
   a. Minorities that live in Chicago and work in Arlington Heights spend between three (3) and four (4) hours each day traveling to and from work. . . .
   c. There is no public transportation linking suburban communities and, therefore, minorities that live in the suburbs must rely on car pools to get them to and from work.
   d. Considering the time and cost factors involved, the

(Footnote continued)

The Effect on Minorities of the Rejection of the MHDC Development

The effect of petitioners' refusal to permit construction of Lincoln Green will be to maintain the virtually all-white housing patterns of Arlington Heights and deprive non-white citizens who are precluded from living in the project of housing and employment opportunities (see, e.g., Tr. 292-96, 480-80, 500-03, 504-06, 591-93; Ps. Ex. 44, 45 and 50). The record established that blacks, who make up 18% of the population of the Chicago metropolitan area, constitute 40% of those eligible for Lincoln Green (Tr. 554-55, 592-93), and that MHDC's affirmative marketing efforts will attract substantial numbers of blacks to Lincoln

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(Footnote continued)

minorities working in Arlington Heights have many problems and this situation would discourage other minorities from seeking employment in the area. These factors must also contribute to the high turnover rate which many employers reported. . . .

9. Based on the information gathered concerning incomes, time and costs of minorities, we believe there is a definite need for low and moderate income housing in the Arlington Heights area. . . .

Considering their incomes, many of the minorities working in Arlington Heights would be eligible for low or moderate income housing. The housing problem is one of the greatest obstacles confronting disadvantaged people in their efforts to improve their standard of living and live within a reasonable distance of their job. Another example of the difficulties of pairing low- and modest-income blacks with jobs in the Arlington Heights area is provided by the Minority Information Referral Center, through which 30 companies with facilities in the northwest suburbs attempt to make job openings available to minority workers living in Chicago (Tr. 497, 500-02). In a recent six month period, some 1,176 jobs were referred by businesses to this referral center, but, as its director testified, "(t)he problem is that industry cannot find adequate numbers of persons for their jobs because they have no way of getting out there or for housing." (Tr. 504, 510).

Green, as they have to other MHDC developments elsewhere (Tr. 45, 229, 251). As the Court of Appeals concluded, "if Lincoln Green were built, it, unlike the rest of the Village, would be an integrated community" and its construction might well result in increasing Arlington Heights' minority population by over 1,000% (517 F.2d 409, 417). In addition, it would act as a signal to other blacks who could afford housing in Arlington Heights that the Village was no longer closed to them, thus increasing integration in the area even more (Tr. 500-01, 583).

The Village Hearings and the Community Response

MHDC supported its proposal for Lincoln Green before the Plan Commission by having its design team present evidence on architecture, planning, and tax and traffic impact (See Ps. Ex. 17 and 42; Ps. Ex. 1-7 and 11-40), all of which were before the Plan Commission and the Trustees when they rejected Lincoln Green (Tr. 158-61, 175-5, 193). Not once at all of the Plan Commission hearings nor at the meeting of the Board of Trustees nor throughout the nine months from the time the MHDC petition was filed until it was rejected by the Trustees was there ever a single word of professional advice or testimony given in opposition to Lincoln Green. Indeed, neither the Plan Commission nor the Trustees ever received or even asked for the opinion or advice of Mr. Kesler, the Village's planner, with respect to the proposed development (App. I 68; Tr. 114-115).

Both the Commission and the Trustees were, however, besieged with advice on the "social issue" that much of the Arlington Heights community felt Lincoln Green raised. There was no question but that the tenants of the proposed development would include a substantial number of blacks and other minorities and that its construction would materially increase integration in Arlington Heights.

The Trustees were well aware that Lincoln Green was proposed as an integrated development when they rejected it (Tr. 175-185; Ps. Ex. 25). There were racially-explicit letters to the local newspaper (e.g., Ps. Ex. 48-1, 48-2, 48-3, 48-7, and 48-9). Thousands of white homeowners filed petitions in opposition to Lincoln Green and an unprecedented number of homeowners and "civic" groups representing hundreds of residents from throughout the Village spoke against the development (Ps. Ex. 17, 42, 37, and 38 [sample of petition containing 3,300 signatures]). The local supporters of the proposal were also a unique combination of religious and church groups, members of human relations committees, the League of Women Voters, and individual citizens (Ps. Ex. 17, 36). The public hearings were characterized by emotional, often racial, reactions on the part of the overflow crowds (Tr. 311-13, 316, 396-97; Ps. Ex. 48, 16 residents "terrified" by crowd).*

One letter from a local resident appearing in the Arlington Heights Herald a month before the first Plan Commission hearing began:

> "Concerning your editorial, 'Housing: An Ignored Issue': It isn't ignored, it's unwanted. We do resist low-income housing because it is a ploy to export

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* The evidence was very similar to that in *Dailey* v. *City of Lawton,* 425 F.2d 1028(3) (10th Cir. 1970), in which purposeful racial discrimination was found. See also *Kennedy Park Homes* v. *City of Lackawanna,* 318 F.Supp. 669, 6.... (W.D.N.Y. 1970), aff'd 436 F.2d 108 (2nd Cir. 1970), *cert. den.* 401 U.S. 1010 (1970); *United States* v. *City of Black Jack,* 508 F.2d 1179 (8th Judicial Circuit, 1974).

> blacks from Chicago to integrate the suburbs. That came out forcefully in the St. Viator housing proposal." (Ps. Ex. 48-1).

Another letter complained:

> "I'm a bit tired of hearing and reading about the Low Income Housing in Arlington Heights for the benefit of our colored and Spanish-American friends in Chicago. One wonders who is running our village, our Mr. Walsh or Mayor Daley." (Ps. Ex. 48-2).

Another letter sent to all members of the Plan Commission and Board of Trustees read in part:

> "Anyone who has seen Cabrini Green and other of those projects know exactly what Mr. Chandler (the MHDC President) is exporting to Arlington Heights." (Ps. Ex. 57).

After a number of people had spoken against Lincoln Green at the initial Plan Commission hearing, the following exchange concluded the remarks from the floor, as reflected in the official minutes of the meeting:

> Rosemary Splitt, 320 N. Carlisle, Arlington Heights, was placed under oath. She stated that she heard a young girl seated behind her, this young girl being from another country, state that this was unbelievable, she didn't think this could happen in America.
>
> Mr. Zviagzne, 208 E. Oakton, Arlington Heights, was placed under oath. He stated that they have the right to choose their friends, when at a picnic they have the right to choose who they wanted to sit with, he believes in humanity, in all races, but doesn't believe he should be obliged on a moment's notice to change, for somebody to come from Chicago and tell him what he should do, what is right for him. He stated he forgave the young lady, she's too young. When you live longer you change your opinion.

> He explained that in Brazil there is a lot of mixing between colors and he hoped that someday we would live together like that, too, but not by being provoked —no shotgun wedding has lasted very long, and that is what he felt was happening. After more discussion in this regard, he concluded that the people in question don't help you, us or anybody, they just make things worse. Therefore, he hoped the committee would represent the people who live here, who plan to live, work and die here (Ps. Ex. 17, pp. 11-12 (3/13/71)).

So emotion-charged were the Plan Commission hearings and so vociferous were the crowds in opposition to those who supported Lincoln Green (Tr. 312-13) that the two Commission members who voted in favor of it felt compelled to begin their official statement with the assurance that they had voted for the development not on the "social issue," but because it represented good zoning (Ps. Ex. 43, p. 1). After the Trustees voted down the MHDC's application, Village President Walsh stated that while there was a need for low and moderate income housing in Arlington Heights, he felt "the objections of the residents is (sic) a mandate to reject this proposal" (Ps. Ex. 42, p. 6).

The Proceedings Below

This suit was then instituted by MHDC and the individual respondents against the Village of Arlington Heights and the members of its Board of Trustees. (Northwest Opportunity Center, another not-for-profit corporation, and Eluteria Maldonado were allowed to intervene as respondents.) The complaint alleged that the refusal to rezone made housing unavailable because of race, perpetuated segregation, and denied MHDC the right to use its property in a reasonable manner in viola-

tion of the Fourteenth Amendment, the Fair Housing Act of 1968 (42 U.S.C. §§3601 *et seq.*), the Civil Rights Act of 1866 (42 U.S.C.A. §1982), and the Civil Rights Act of 1871 (42 U.S.C. §1983).* The principal relief requested a declaratory judgment invalidating the Arlington Heights zoning ordinance as applied to the subject property and an injunction restraining petitioners from preventing or interfering with the development of the housing proposed by Metropolitan Housing (517 F.2d 412).

The record at trial included substantial evidence regarding the racial and employment impact of Lincoln Green, as well as most of the evidence on architecture, demand, taxes, traffic, and other zoning and planning considerations that were before the Trustees when they rejected the development. In addition, the evidence showed that petitioners had previously rezoned 60 parcels of land in Arlington Heights for large, multi-family projects (Ds. Ex. 10 and 11), most of which were adjacent to single-family homes (Ps. Ex. 12 and 52). The result, as petitioners concede, is that by 1973 there were over 6,000 high-rent apartments in Arlington Heights with proper zoning available for some 9,000 more, while not a single unit of subsidized housing has been permitted by petitioners. Thus, the zoning policies of Arlington Heights have turned the 1950 village of 8,768 persons into the most racially exclusionary and residentially segregated community in the Chi-

* Jurisdiction over the Village was based upon 28 U.S.C. §1343 (for the §1982 claim), and 42 U.S.C. §3612 (for the §§ 3604 and 3617 claim). Jurisdiction over the individual defendants, all officials of the Village, and the Village was based upon §1331 (for the Fourteenth Amendment claim), §1343 (for the §§ 1982 and 1983 claims), and §3612 (for the §§ 3604 and 3617 claims).

cago metropolitan area among municipalities with more than 50,000 residents.*

The District Court, concluding that there was no racial discrimination nor violation of constitutional or statutory rights involved, denied any relief. The Court of Appeals reversed, noting that the MHDC's development presented the only hope of easing the segregated housing patterns of Arlington Heights and holding that "under the facts of this case, Arlington Heights' rejection of the Lincoln Green proposal has racially discriminating effects" and

* Despite petitioners' recognition "in theory" of the tremendous need for low and moderate income housing in Arlington Heights (supra, p. 9), their rejection of Lincoln Green was, in effect, a refusal to permit any integrated, subsidized housing in the Village, since no economically feasible and suitable alternative site was available (517 F.2d 409, 414).

The record demonstrates that none of the vacant R-5 parcels in Arlington Heights could be used for subsidized housing. Each of these properties had been zoned multi-family for a particular commercial project (Tr. 812). Lincoln Green, or any other subsidized proposal, could not, therefore, be developed on any of them without new and different petitions being submitted to the Village for approval. The planned high-rent projects have such names as "Frenchmen's Cove," "Three Lakes," and "Randhaven" (Ds.Ex. 120, App. II 120). These sites could not be used for more modest priced housing (Tr. 830). Even more important, few of the remaining parcels were available for sale, and those that were commanded prices so high that they made a Section 236 development impossible (Tr. 813, 824-25, 830, 969, 972). For example, Mr. Opelka, petitioners' expert witness on Arlington Heights land values, testified that he did not know of any pieces of vacant R-5 land of more than 10 acres (Tr. 944-45) and that the one R-5 parcel whose value he did know was priced at $50,000/acre (Tr. 973), two and a half times the cost of the Viatorian land to MHDC. No other R-5 land was available for Lincoln Green at anywhere near the minimum cost set by the Viatorians in their effort to have low and moderate income housing built on their land (Tr. 972-73).

therefore violated the Equal Protection clause of the Fourteenth Amendment, since no compelling public interest necessitated that decision.*

SUMMARY OF ARGUMENT

I.

Lincoln Green is carefully planned as a private, high-quality townhouse development that is specifically designed to help alleviate housing segregation in the suburban Chicago area, and is compatible with neighboring single-family homes and legitimate community interests. Petitioners' refusal to permit construction of Lincoln Green has a racially segregative effect and perpetuates residential segregation in and around Arlington Heights. Since Arlington Heights' rejection of Lincoln Green was racially discriminatory and not justified by any compelling public interest, it therefore violates the Equal Protection clause of the Fourteenth Amendment.

II.

Petitioners' refusal to permit construction of Lincoln Green also violates the 1968 Fair Housing Act and other Federal Civil Rights Acts. In enacting the 1968 Fair Housing Act, (42 U.S.C. §§3601 *et seq.*), Congress prohibited all acts, public as well as private, that make housing unavailable because of race in order to replace the nation's

* Fairchild, Ch. J., dissented on a question of fact but agreed that, as a matter of law, if respondents "establish that the Village's enforcement of its zoning scheme makes construction of housing for low and moderate-income individuals not reasonably possible, the refusal perpetuates racial segregation and, absent compelling governmental justification, the respondents would be entitled to the relief they seek." (517 F.2d 409, 415).

ghettos with "truly integrated and balanced living patterns." *Trafficanti* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972).

Judicial interpretations and administrative interpretations of the fair housing laws establish private efforts that would substantially reduce suburban housing segregation cannot be blocked absent a compelling public interest. In addition, The Fair Housing Law should be construed like other civil rights laws to eliminate arbitrary and unjustifiable barriers to equal housing opportunity such as those erected by Arlington Heights here.

III.

The lower courts correctly treated all respondents as proper parties with adequate standing to challenge petitioners' discriminatory action. Since Lincoln Green was a specific proposal for an integrated housing development in Arlington Heights to be occupied by the individual respondents and their class, *Warth* v. *Seldin*, 422 U.S. 490, 45 L.Ed. 2d 343 (1975) does not undercut standing here and indeed indicates that the facts of this case clearly establish that respondents have standing because they have an adequate stake in the outcome of the litigation.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONERS' REFUSAL TO PERMIT THE CONSTRUCTION OF LINCOLN GREEN VIOLATES THE AMENDMENT.

A. The record shows that petitioners' refusal to permit the construction of Lincoln Green was racially motivated.

The members of the Plan Commission and the Trustees were aware that by blocking Lincoln Green they would perpetuate segregation in Arlington Heights by preventing the construction of any low and moderate income housing in Arlington Heights, thereby making housing unavailable for blacks and other minorities (517 F.2d 409, 418). Nevertheless, petitioners' brief is laced with protestations that illicit racial "motive", "intent", or "racial purpose" has not been proved, (e.g., Pet. Br. pp. 6, 7, 8, 15, 17, 22, 27).*

The record shows that members of the Arlington Heights community responded to news of the proposed MHDC development with hostile, over-flow crowds at the

* Petitioners' argument is particularly objectionable because evidence with respect to their state of mind and motivation in blocking the MHDC development was excluded at their insistence (Tr. 170-71). Despite this evidentiary limitation, the record contains substantial evidence establishing petitioners' racial motivation. For example, Village President Walsh admitted that the Trustees' rejection of Lincoln Green was in response to community opposition, in which race played a clear part (Ps. Ex. 42, p. 6).

hearings before the Plan Commission and the Board of Trustees and with angry, often racially-explicit letters and petitions in opposition to Lincoln Green (*supra*, pp. 17, 18).*

As the Tenth Circuit stated in *Dailey, supra,* at 1039, no official statement of intent to discriminate is necessary to prove a violation of the equal protection clause.

> If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection. In our opinion it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals. *Dailey, supra,* at 1039.

Here, petitioners admitted that they blocked Lincoln Green "in response to community opposition," (Ps. Ex. 42, p. 6), a result they knew would maintain residential segregation in this area.**

* Lower courts have consistently recognized the probative value of evidence of white hostility in establishing that municipal action excluding low and moderate income housing was racially motivated. *Kennedy Park Homes* v. *City of Lackawanna,* 436 F. 2d 108 (2nd Cir. 1970); *United States* v. *City of Black Jack,* 508 F. 2d 1179 (8th Cir. 1974); *Banks* v. *Perk,* 473 F. 2d 910 (6th Cir. 1973); *United Farmworkers* v. *City of Delray Beach,* 493 F. 2d 797 (5th Cir. 1974). While discrimination may be measured solely on the basis of effect, the evidence of purpose may be taken into account. "This is not to say that proof of motive, purpose or intent may not reinforce a finding of racial discrimination or serve as a basis of such finding." *Hawkins* v. *Town of Shaw,* 461 F. 2d 1171, 1175 (197).

** The rule is that a man is held to intend the foreseeable consequences of his conduct, *Radio Officers* v. *Labor Board,* 347 U.S. 17, 45 (1953). This presumption applies to public officials as well. *Rabinowitz* v. *United States,* 366 F. 2d 34, 56 (5th Cir. 1966).

B. Petitioners' refusal to permit the construction of Lincoln Green unlawfully perpetuates residential segregation.

Although there is substantial evidence of petitioners' discriminatory purpose in their rejection of Lincoln Green here, the primary reason their action violates the Fourteenth Amendment is, as the Seventh Circuit recognized, that it has the effect of discriminating against minorities. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961). *Wright* v. *City of Emporia,* 407 U.S. 451 (1972). When, as here, the effect of a municipality's action is to reinforce and prolong the severely segregated housing patterns in its area, that action is subject to "strict scrutiny" and cannot stand absent a compelling justification.* The result of petitioners' action is effectively to exclude minorities from and perpetuate segregation in Arlington Heights, a result this Court can not condone. See *Buchanan* v. *Warley,* 245 U.S. 60 (1917). Since the measure of state action is the *result* it achieves, it follows indisputably that municipal action that results in such perpetuation of segregation is illegal. When confronted with a situation in which petitioners *must act,* they must at least act so as

* Petitioners' emphasis on *Lindsey* v. *Normet,* 405 U.S. 56 (1972), to argue that housing is not a "fundamental interest" and therefore the "strict scrutiny" test does not apply here is misplaced. "Strict scrutiny" is required here simply because petitioners' action is racially discriminatory. *Lindsey* was a landlord-tenant case that in no way involved race and is therefore irrelevant to the equal housing opportunity values raised by this case, values which Congress has determined involve the highest national priority. See *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972).

not to interfere with private efforts to accomplish substantial integration and so as not to perpetuate segregation.*

The Court of Appeals began its analysis of the racially segregative effect of Arlington Heights' rejection of Lincoln Green by noting that a greater percentage of blacks than whites would be injured by the municipality's action.** Contrary to petitioners' repeated assertions, however, the court did not hold that this racial disparity *alone* amounted to a violation of the Fourteenth Amendment. Indeed, the Seventh Circuit especially recognized that action such as that in *James* v. *Valtierra,* 402 U.S. 137 (1971) which discriminates on an economic basis can only be exempt from "strict scrutiny" if that action is challenged solely on the ground that proportionately more blacks are poor.***

As the Court of Appeals pointed out, however, the segregative effect of petitioners' refusal to permit construc-

* A municipality's refusal to approve zoning in order to block an integrated housing development is state action for equal protection purposes. E.g., *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970).

** Blacks would be disproportionately affected insofar as blacks make up 40% of the potentially eligible population for low and moderate income housing in the SMSA while they are only 18% of the population of the SMSA. (Tr. 592-93). The suspect class affected by the action of Arlington Heights is composed of individuals with low and moderate incomes. Blacks and other minorities do make up a greater percentage of such class than they do of the population generally in the Chicago metropolitan area. (517 F.2d 409).

*** *James* v. *Valtierra,* 402 U.S. 137 (1971) is not applicable here. First, it did not involve racial discrimination, 402 U.S. at 141, and second, it did not involve governmental action but rather dealt with referendum procedures and rights not in issue in this case.

tion of Lincoln Green cannot be judged alone by the fact that its impact will fall more heavily on blacks but must also be viewed in the context of the over-all patterns of residential segregation in the Arlington Heights area. See: *United States* v. *City of Black Jack,* 508 F.2d 1179, and *Kennedy Park Homes* v. *City of Lackawanna,* 318 F.Supp. 669.

This context includes the facts that:

> historically the Chicago metropolitan area has been segregated in terms of housing . . . (and) that there exists in Chicago and its environs a high degree of racial residential segregation. As the court said in *Clark* v. *Universal Builders, Inc.,* 501 F.2d 324, 334-35 (7th Cir. 1974), "Nor do we think it beyond the strictures of judicial notice to observe that there exists in Chicago and its environs a high degree of racial residential segregation." More specifically, the population of Arlington Heights in 1970 was 64,884, but only twenty-seven residents were black.[1] The four-township northwest Cook County area, of which Arlington Heights is a part, had a population increase from 1960 to 1970 of 219,000 people, but only 170 of these were black.[2] Indeed, the percentage of blacks in this area actually decreased over this ten-year span while the percentage of the population of the entire Chicago metropolitan area that was black increased from fourteen percent to eighteen percent.*

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* Footnotes 1 and 2:

[1] According to statistics of plaintiffs' expert, demographer and urbanologist Pierre de Vise, Arlington Heights is the *most residentially segregated community* in the Chicago metropolitan area among municipalities with more than fifty thousand residents.

[2] The impact of this statistic can be fully appreciated only in the context of the shift in employment opportunities during that same period. While the City of Chicago lost 230,000 jobs, the number of jobs in the four-township Arlington Heights area rose from

(Footnote continued)

As the Court of Appeals observed, the Lincoln Green proposal represents a unique opportunity to help reverse this trend toward increasingly segregated housing patterns, both in the entire Chicago area and more dramatically in the composition of Arlington Heights. In addition, if "Lincoln Green were built, it, unlike the rest of the Village, would be an integrated community," and "it might well result in increasing Arlington Heights' minority population by over one thousand percent" (517 F.2d at 417). Furthermore, petitioners' rejection of Lincoln Green means that no integrated, subsidized housing will be built in Arlington Heights (517 F.2d at 417), and petitioners have, therefore, rejected "the only present hope" that even a modest private effort could be made toward eliminating the pervasive problem of segregated housing in the area. *Id.* Understood in this context, petitioners' action not only disproportionately injures blacks, but it exploits and perpetuates segregated housing patterns in a way that directly violates the national housing policy of "replacing the ghettos by truly integrated and balanced living patterns." *Trafficante, supra.*

Petitioners' zoning powers are not so broad as to justify actions that perpetuate segregation. Neither *Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926) nor *Village of*

(Footnote continued)

100,000 to 200,000. Blacks, however, have not been able to take full advantage of these job opportunities. In 1970 only 137 of the 12,000 people who worked in Arlington Heights were black. Part of the explanation for this is that many black workers have been unable to find housing they can afford in Arlington Heights. A study issued by the Cook County Office of Economic Opportunity indicated that based on its survey almost all the black workers in Arlington Heights resided in Chicago. Moreover, the report stated that one of the main problems Arlington Heights' employers faced in hiring minorities was the lack of adequate housing within a reasonable distance of their plants.

Belle Terre v. *Boraas,* 416 U.S. 1 (1974) sanctions such unbridled municipal discretion to use these powers to reject private desegregation efforts, absent compelling public justifications. In *Euclid,* the Court sustained a zoning ordinance that prevented industrial use of certain land but recognized "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." 272 U.S. at 390. *Belle Terre* was concerned with a zoning provision designed to protect natural families from unrelated groups, not white homes from integrated townhouses nor "land use controls . . . confining minorities and the poor to the ghetto" (Marshall, J., dissenting, 39 L. Ed. 2d at 807). Neither *Euclid* nor *Belle Terre* involved racial discrimination at all, and as the Eighth Circuit held in invalidating an exclusionary zoning action similar to the one at issue here, "The discretion of local zoning officials, recently recognized in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974) must be curtailed where "the clear result of such discretion is the segregation of low income Blacks from all White Neighborhoods." *U.S.* v. *Black Jack,* 508 F.2d 1184 (8th Cir. 1974).

All of the Courts of Appeals that have dealt with the problem of exclusionary zoning and residential segregation have recognized that compelling public interests are necessary to justify governmental actions which interfere with private efforts such as MHDC's to promote desegregation.

Dailey v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970) is similar in many ways to the instant case. There, a developer unsuccessfully sought rezoning to a multi-family classification in order to build low and moderate income housing. In striking down the municipality's action, the

court found that the city's denial of the request was prompted by a desire to keep a large concentration of blacks from moving out of the black ghetto of Lawton into the white area in which the property was located.

In *Kennedy Park Homes Ass'n.* v. *City of Lackawanna,* 318 F. Supp. 669 (W.D.N.Y. 1970), *aff'd,* 436 F. 2d 108 (2nd Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971), the Catholic Archdiocese of Buffalo committed itself to sell land in a white section of a Buffalo suburb for the development of a low income housing project. The development was prevented when the Mayor refused to sign a sanitary sewer form needed for construction. The District Court found that "[t]he history of Lackawanna is that of a racially separate community." (318 F. Supp. at 694). The city had refused to permit private parties to break down the racial separation of the community. The court held that this refusal denied plaintiff's "equal housing opportunity" (*id.* at 694) in violation of the equal protection clause and the 1968 Fair Housing Act.*

Crow v. *Brown,* 332 F. Supp. 382 (N.D. Ga. 1974), aff'd, 457 F.2d 788 (5th Cir. 1972) is even more explicit on the duty of municipalities not to prevent private efforts aimed at desegregation. There, officials of suburban Fulton County (of which Atlanta is the core) refused to issue building permits for two private developers of public housing. The Court held:

> Given the decisions previously cited [including *Lackawanna* and *Dailey*] it is abundantly clear that, *in the absence of supervening necessity any county action or inaction intended to perpetuate or which in effect does perpetuate residential segregation in the county with attendant school segregation and dislocations of jobs and housing cannot stand. Nor can county action or*

* See *infra* for discussion of the Fair Housing Act.

> *inaction which would thwart their correction be permitted to continue.*
>
> The county defendants testified that they are aware of these conditions, yet they have come forward with no justification, compelling or otherwise, for their passivity, their refusal to cooperate, indeed their active opposition to plans designed to alleviate them. 332 F. Supp. at 392 (emphasis supplied)

The Fifth Circuit reaffirmed this principle recently in *United Farm Workers of Florida Housing Project, Inc.* v. *City of Delray Beach, Florida,* 493 F. 2d 799 (5th Cir. 1974), where it ruled that a municipality cannot refuse to provide water and sewer services to a private low and moderate income development:

> . . . [i]n the realm of federally assisted housing, local authorities have an obligation to further the national housing policy of balanced public housing and to refrain from frustrating efforts to carry out that policy. (citations omitted)

As discussed earlier, Arlington Heights is a segregated community (*supra* at p. 16) with a highly exclusionary housing stock. It is a part of a segregated region that is becoming even more segregated. Lincoln Green would be the only integrated housing in the Village and would substantially increase integration in the Arlington Heights area. Petitioners' rejection of Lincoln Green was, in effect, a refusal to permit any integrated subsidized housing in Arlington Heights. No other sites appropriate for Lincoln Green were known to the Trustees when they voted against the development (Tr. 203) and none existed within the Village (Tr. 45-47 Ps. Ex. 56).*

Thus petitioners' refusal to permit construction of Lincoln Green perpetuates residential segregation. Their

* Supra, p. 21.

action is inconsistent with their duty of non-interference with private desegregation efforts. As the Court of Appeals held, therefore, "under the facts of this case, Arlington Heights' rejection of the Lincoln Green proposal has racially discriminatory effects . . . [and] could be upheld only if it were shown that a compelling public interest necessitated the decision" (517 F.2d 409, 415).

C. No compelling public justification exists that can excuse petitioners' rejection of Lincoln Green.

The Court of Appeals correctly found that there was no compelling interest served by Arlington Heights' refusal to permit construction of Lincoln Green.

> As we have already indicated, the Village has not even been consistent in applying its zoning plan when considering requests for zoning changes to R-5. Moreover, even if a municipality's desire to limit multi-family dwellings to instances which they might serve as a traditional buffer zone could ever be a compelling interest, it is certainly not in this case (517 F. 2d 409, 415).

The court recognized that the low-rise structures proposed were compatible with surrounding housing and the expressed planning policy would at best have only minimal application.

> As noted by two dissenting members of the Arlington Heights Plan Commission, in terms of density, architecture and most other characteristics, such townhouses are more similar to R-3 dwellings than R-5 buildings. The planning rationale behind the buffer zone policy has only minimal applicability to this type of low-rise, open-space development. It is not a sufficiently compelling interest to justify the racially discriminatory effect (517 F.2d 409, 415).

As the court found, petitioners' inconsistent application of its claimed "buffer policy" could not justify the racially discriminatory effects present here (517 F.2d 409, 415).

The Court next dealt with the supposed diminution in surrounding property values that petitioners claimed would result from Lincoln Green and found such diminution does not constitute a compelling interest:

> Nor do we find that the decision can be supported by the fact that neighboring property values might be diminished by as much as five to ten percent as asserted by respondents' witness. It is questionable whether this purely monetary consideration could be a compelling interest. In this instance it is not.
>
> * * *
>
> Not only have there been other variances in Arlington Heights, but the neighboring residents certainly could not expect that the zoning plan would always be adhered to even when a racially discriminatory effect would result (517 F.2d 409, 415).

Petitioners' argument that an affirmative duty has been imposed on Arlington Heights is not well founded. (Pet. Br. 25). What is sought here is the right to build Lincoln Green and the order of the Court of Appeals merely allows MHDC to construct the proposed integrated housing. No affirmative duty or obligation is being placed on Arlington Heights but rather a duty of non-interference.

Petitioners also erroneously suggest that rulings in certain state court cases (Pet Br. 30-34) set forth criteria which, when applied to the facts here, can be claimed as support for the segregative decision. However, when the criteria are applied the results do not establish a compelling or substantial reason for allowing a decision which results in a segregative effect.*

* The evidence shows that the plan referred to was passed in 1959 and that most of the homes were built prior thereto (Tr. 812).

Petitioners have not offered any legitimate justification which courts confronting the issue of exclusionary zoning have recognized as satisfying the strict scrutiny test. Rather, they have simply offered a preservation of local property values defense and reliance on zoning "integrity" (517 F.2d 421). That defense is not enough.

As anticipated by the Court's observation in *Euclid,* in recent years less tolerance has been shown for municipal action which serves only the parochial demand of those in the immediate vicinity to the detriment of the

* The criteria set forth by petitioners as that used by many state courts to test zoning validity do not apply here where Fourteenth Amendment and Fair Housing Act claims are involved. Even if applied, they would allow the decision of the Seventh Circuit to stand: 1. The existing uses and zoning of nearby property: the zoning of surrounding properties is not persuasive against the proposal since the planned townhouses are much like the single family. 2. The extent to which property values are diminished by the particular zoning restrictions: the testimony on diminution is not enough to support a reversal. 3. The extent to which the destruction of property values of the plaintiffs promotes the health, safety, morals and welfare of the public: the project is highly related to public welfare so the refusal did not promote health, safety, morals or welfare. 4. The relative gain to the public as compared to the hardship imposed upon the individual property owner: the gain to the public is high while hardship to individuals is insignificant. 5. The suitability of the subject property for the zoned purposes: the respondents showed the multiple-family use is the highest and best use. 6. The length of time the property has remained vacant as zoned, considered in the context of land developments in the area: the Clerics of St. Viator own the entire parcel which makes it unique. No evidence was solicited with respect to their reasons for not acting on the property previously.

entire region. Courts have recognized the necessity for considering the rights of non-residents as well as residents in assessing the reasonableness of suburban zoning actions.

As the Pennsylvania Supreme Court noted in *Appeal of Kit-Mar Builders, Inc.*, 268 A. 2d 765, 769 (Ba. 1970):

> We fully realize that the overall solution to these problems lies with greater regional planning; but until the time comes that we have such a system, we must confront the situation as it is. The power currently resides in the hands of each local governing unit, and we will not tolerate their abusing that power. . . .

Illinois courts have explicitly recognized housing needs as an important consideration in judging the reasonableness of a zoning decision which excludes certain types of housing.

In *Lakeland Bluff, Inc.* v. *County of Will*, 252 N.E. 2d 765 (Ill. App. 1969), a county's refusal to rezone for a mobile home park was overturned. The court found that the plaintiff had shown a need for low-cost housing in the area, that mobile homes would help satisfy that need, and that this "was an element which should be considered in determining the reasonableness of the restrictive zoning ordinance." 252 N.E. 2d at 770. See also *Glassey* v. *County of Tazewell*, 297 N.E. 2d 235 (Ill. App. 1973). The evidence here clearly establishes that a desperate area-wide need for low and moderate income housing exists.

Petitioners ignore this need in contesting the reasonableness of the decision of the Court of Appeals. Instead they rely on a mechanistic formula for determining reasonableness, but even following that approach, the denial of zoning is improper for several reasons. First, Lincoln

Green is consistent with the existing uses and zoning of nearby property. As the record demonstrates, the proposed development is complementary to the surrounding housing, and only the Village's absence of an appropriate zoning classification scheme forced respondents to seek a zoning classification which would allow the individual townhouse type construction (517 F. 2d 410).

Second, the District Court found that "Plaintiffs did prove that the 'highest and best use' of this property from an economic standpoint is for multi-family dwellings." (373 F.Supp. 209).*

Third, and most important, the public interest considerations favor development of Lincoln Green.

As stated by the court in *Stalzer* v. *Village of Matteson*, 303 N.E. 2d 489 (Ill. App. 1973), the use of property cannot be restricted or limited merely because neighboring property owners so desire, or because they think it might protect the value of their residences. In upholding the plaintiffs' right to develop his parcel for a planned unit multi-family development there, the court stated:

> No gain of any kind to the *general public* appears from the R-1 zoning. It would appear that the public interest would be better served by creation of an apartment project which would make more than 200 apartments available for family use at reasonable rentals. (emphasis added) 303 N.E. 2d at 495.

The public interest will be served by Lincoln Green, which will begin to satisfy the desperate need for housing for

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*Any diminution in neighboring home values attributable to the proposed development would be merely a reflection of the prejudice of the local homeowners, as the District Court acknowledged when it noted that the hostility of these residents may have been a factor. 373 F. Supp. 209.

low and moderate income persons outside the inner-city in a booming area rich in jobs.*

No compelling justification exists for the refusal to permit construction of Lincoln Green and therefore such refusal is a violation of the Equal Protection Clause of the Fourteenth Amendment.

II.

PETITIONERS' REFUSAL TO PERMIT DEVELOPMENT OF LINCOLN GREEN VIOLATES THE FAIR HOUSING ACT AND CIVIL RIGHTS ACTS.

A. Introduction

The Court of Appeals concluded that Arlington Heights' rejection of the Lincoln Green proposal violated the Equal Protection Clause since it had racially discriminatory effects which could not be adequately justified by petitioners. The Court below did not go on to consider the other bases on which petitioners' action was also challenged. Its conclusion, however, that the rejection of Lincoln Green would have the effect of perpetuating residential segregation in

* In support of the decision below, the District Court referred to the "integrity of the Village's zoning plan." The evidence shows, however, that the Arlington Heights comprehensive plan was developed in 1959 (Tr. 812) when its population was about one-third its present size and at a time when planning for residential uses was limited to single-family. (Tr. 812). As the evidence showed, the only multi-family residences built in Arlington Heights are the product of rezonings such as that requested by the respondents. Even with the advent of substantial industry in the area, no provision *whatsoever* was made to update the Village's comprehensive plan to accommodate the needs of the low and moderate income persons working there.

Arlington Heights is also sufficient to establish a violation of the 1968 Fair Housing Act, whose purpose is to "replace the ghettos by truly integrated and balanced living patterns". *Trafficante* 409 U.S. 205, 211.

Specifically, petitioner's conduct violates §§804 (a) and 817 of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, 42 U.S.C. §§3601 et seq.) and the Civil Rights Act of 1866 (42 U.S.C. §1982) by making housing for minority persons unavailable* and by interfering with the provision of housing opportunities to such persons.** E.g., *United States* v. *City of Black Jack, Missouri,* 508 F. 2d 1179 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042 (1975). Apart from whatever affirmative responsibilities petitioners may have, based on their exploitation of the patterns of severe and growing residential segregation in Arlington Heights, the municipality has *at least* the duty under the Fair Housing Act to use its zoning powers so as not to interfere with private efforts which

* In language "as broad as Congress could have made it" (e.g., *Zuch* v. *Hussey,* 366 F. Supp. 553, 557 (E.D. Mich. 1973), §804 (a) (42 U.S.C. §3604 (a)) makes it unlawful to "make unavailable . . . a dwelling to any person because of race." ("Dwellings" include the type of "vacant land which is offered for sale or lease" (§802 (b)) that is involved here. See *United States* v. *City of Black Jack, Missouri, supra.*) Under that provision all practices "which have the effect of denying dwellings on prohibited grounds are unlawful." *United States* v. *City of Parma,* P.H.E.O.H. Rptr. Para. 13,616 N.D. Ohio 1973.

**§817 (42 U.S.C. §3617) makes it unlawful to "interfere with any person in the exercise or enjoyment of . . . or on account of his having aided or encouraged any other person to the exercise or enjoyment of any right granted or protected by sections 803, 804, 805, or 806."

would appreciably reduce segregation within its jurisdiction. *Id.**

B. Arlington Heights' conduct had the effect of perpetuating segregation, thereby placing a burden on Arlington Heights to show a compelling non-racial justification for the refusal.

In recent decades, Arlington Heights has become a large, 99.9% white city through zoning and other municipal decisions permitting the development of thousands of high rent housing units that have not been made available to minorities. *Clark, supra.* As the Court of Appeals concluded, petitioners have not merely ignored the segregated housing patterns in their area; they have exploited them. Here, they have, without compelling justification, obstructed the only development which would have provided minorities with low-cost, affirmative marketed housing units, the only development that could have appreciably reduced segregation within the Village. It was precisely this type of municipal zoning interference with private efforts to develop and market low and moderate income housing for minorities in places where those opportunities had been unavailable before that the Eighth Circuit held violated the Fair Housing Act in *United States* v. *City of Black Jack, Missouri, supra.*

The justifications advanced by Arlington Heights for its refusal to approve Lincoln Green are not persuasive. Since

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* Contrary to the suggestion often made by petitioners, respondents never claimed that they had a "right to housing" or a right to live anywhere in particular. *They are not asking Arlington Heights to build housing for them.* (Compare *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) and *Memorial Hospital* v. *Maricopa County,* 94 S.Ct. 1076 (1974), which did require that the state or county spend money on the injured class, with the record here which establishes that Arlington Heights will benefit financially if Lincoln Green is built.)

the development would significantly reduce segregation by increasing the number of blacks in the Village ten times over, it comes within the protection of the Fair Housing Act and petitioners' efforts to obstruct it should be enjoined. As the Eighth Circuit observed in *Black Jack,* the Fair Housing Act requires removal of the artificial, arbitrary, and unnecessary barriers to housing opportunities when those barriers operate invidiously to discriminate on the basis of race. "The discretion of local zoning officials, recently recognized in *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974), must be curtailed where the clear result of such discretion is the segregation of low income Blacks from all White neighborhoods [citing cases]." 508 F.2d at 1184.

Petitioners misconstrue their responsibilities under the Fair Housing Act and the decision below when they argue that the logic of this decision would dictate that there can no longer be any single-family zoning district in any municipality if a developer seeks to build housing which he can show might be occupied by a greater percentage of a minority group than presently existed in that municipality. (Pet. Br. at 16) On the contrary, all that is to be determined here is that the single-family zoning classification of a long vacant parcel, such as the one here, cannot be used to frustrate a unique development which the developer proves, because of the nature of the housing and of his marketing program, would *in fact* be significantly more integrated than the community and thereby would *appreciably* decrease segregation in the community when the municipality has no compelling reasons to prevent the development from going forward.

Petitioners also misconstrue the responsibilities imposed by the Fair Housing Act and the decision below when they argue that the Seventh Circuit determined "that Arlington Heights has an affirmative duty to ignore its own Zoning

Ordinance in order to take affirmative action to resolve the alleged segregation pattern of housing in the Chicago metropolitan area." (Pet. Br. at 25) The law of this case imposes no affirmative duty on Arlington Heights. It seeks to prevent municipal interference with MHDC's private creation and distribution of desegregated housing opportunities for minorities, not to impose upon Arlington Heights an affirmative duty to create housing opportunities or incur any cost in the creation of such opportunities by the private sector.

The Second Circuit has explicitly recognized this distinction. Thus, while refusing to impose upon a county "an affirmative duty to construct housing," *Acevedo* v. *Nassau County,* 500 F. 2d 1078, 1081 (2d Cir. 1974) or to order a city affirmatively to take steps to insure that a subsidized housing development would be built, *Citizens Committee for Faraday Wood* v. *Lindsay,* 507 F. 2d 1065 (2nd Cir. 1974), *cert. denied,* 421 U.S. 948 (1975), it reaffirmed that Courts should continue to enjoin ". . . the governmental obstruction of private projects beneficial to minority groups or to integration" (*Acevedo,* 500 F. 2d at 1081). In language particularly relevant to the case at bar, the Second Circuit concluded that:

> . . . the City of Lackawanna was clearly segregated . . . Against this background we held that the city could not, absent a compelling interest, thwart the efforts of a private organization to build housing for low-income families in the white area of the city by, among other things, refusing to accede to a reasonable rezoning request. Other courts have reached similar results. Faraday Wood, 507 F. 2d at 1069 (Citations omitted).

No affirmative duty is sought to be imposed upon Arlington Heights; the injunction sought is prohibitory, not mandatory. Arlington Heights will not be asked to incur

any costs of the development.* All that is sought is an injunction restraining the respondents from interfering with the development of Lincoln Green.

C. The Acts here complained of violate Title VIII, the Fair Housing Act, which is as broad as Congress could have made it, and other civil rights laws as well.

Congress has declared that the purpose of the Fair Housing Act is "to provide, within constitutional limitations, for fair housing throughout the United States" (42 U.S.C. §3601), and this Court has made clear that the Act should be given a "generous construction" to effectuate its purpose of replacing "the ghettos by truly integrated and balanced living patterns." *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205, 211 (1972).** HUD has administratively established criteria to provide for integration.***

*As the Court of Appeals noted, the development would have a positive tax impact upon the Village and the school district (see *supra* at 9); they will both receive more in tax dollars from the development than they will expend in servicing Lincoln Green and its residents. *Compare Valtierra,* 402 U.S. 137, 143 and *Palmer,* 403 U.S. 217, 228-30, where the majority and two concurring justices, respectively, expressed reluctance in granting relief because the municipality would be forced to incur perpetual tax loss.

** Clearly, Congress saw the 1968 Fair Housing Act as a vehicle to eliminate the barriers that prevent movement by blacks into white areas and to remedy segregated housing patterns and the problems they cause—segregated schools, the unavailability of suburban employment opportunities to minorities, and the alienation of white and black Americans due to "lack of experience in actually living next" to each other. 114 Cong. Rec. 2274-76.

See also the further discussion by Senator Mondale at 114 Cong. Rec. at 2279-80, 9559, and 9590.

***HUD's Project Selection Criteria applicable to FHA §236 Housing 24 C.F.R. part 200, P.H.E.O.H. Rptr. Para. 4311 include requirements that need for subsidized housing be considered in site selection along with providing minority opportunities outside existing areas of minority concentration.

In construing the Civil Rights Act of 1866 to prohibit housing discrimination, this Court declared that

> . . . When racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery. *Jones* v. *Mayer Co.*, 392 U.S. 409, 442, 443 (1968).

The next year, this Court reaffirmed that a "narrow construction of the language of §1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded" by it. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 237 (1969).*

Lower courts have consistently reaffirmed that the purpose of the Fair Housing Act is to foster residential integration. As the Second Circuit has observed, the goal is "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat." *Otero* v. *New York City Housing Authority,* 484 F.2d 1122, 1134 (2nd Cir. 1973); see also *Crow* v. *Brown,* 332 F. Supp. 382, 391 (N.D. Ga. 1971), *aff'd,* 457 F. 2d 788 (5th Cir. 1972); *Barrick Realty* v. *City of Gary,* 491 F.2d 161, 164 (7th Cir. 1974).

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* §1982 is designed to eliminate housing practices, whether overtly discriminatory or not, which have the unjustified effect of perpetuating residential segregation. In *Clark* v. *Universal Builders,* 501 F.2d 324, 331 (7th Cir. 1974), *cert. denied,* 419 U.S. 1070 (1974), sellers who exploited the dual housing market by selling to blacks at inflated prices were held to have violated §1982 in part because their actions "prolong and perpetuate a system of racial residential segregation. . . ." (citation omitted). The court went on to rule that discrimination against black citizens could not be perpetuated, even if it was not of the actor's own making and even if the acts having the discriminatory effect were "well-intentioned, good-faith efforts. . . ." 501 F.2d at 332.

Specifically, the lower courts have not shirked from carrying out this clear Congressional intent by holding that municipal exclusion of low and moderate income housing violates the 1968 Act, where, as here, that municipal action has the effect of perpetuating residential segregation and is not justified by compelling state interests. *United States* v. *City of Black Jack, supra, Kennedy Park Homes* v. *City of Lackawanna,* 318 F. Supp. (W.D.N.Y. 1970), *aff'd,* 436 F. 2d 108 (2nd Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971); see also *Sisters of Providence* v. *City of Evanston,* 335 F. Supp. 396 (N.D. Ill. 1971); *cf. United Farm Workers of Florida Housing Project, Inc.* v. *City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974).

In *Black Jack,* for instance, the Eighth Circuit struck down a zoning ordinance that prevented construction of a subsidized, integrated development such as Lincoln Green in an all white area, despite a finding below that the municipality had not been shown to have acted with racially discriminatory motives. After reviewing the broad scope and remedial purposes of the Fair Housing Act, the Court of Appeals held that the respondent in such a case

> "need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect . . . The respondent need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. Effect, not motivation, is the touchstone, in part because clever men may easily conceal their motivations, but more importantly, because
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> . . . [w]hatever our law was once, . . . we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of willful scheme.

United States v. *City of Black Jack, Missouri,* 508 F.2d at 1184-1185 (citations and footnotes omitted.)

The Eighth Circuit then went on to reverse the lower court's determination that the challenged zoning ordinance had no discriminatory effect. The trial judge in *Black Jack* had focused, as petitioners attempt to do here, *only* on the statistics with respect to eligible residents that showed that the obstruction of the development would have a slight disproportionate impact on minorities. The Court of Appeals there, as the Seventh Circuit did here, noted that such a myopic view failed to take into account either the "ultimate effect" or the "historical context," which specifically included assessment of the municipality's action in light of the overall segregated housing patterns in the greater St. Louis area. 508 F.2d at 1186. Although Black Jack had not caused these segregation patterns to develop (as petitioners foreswear responsibility here),

> "Black Jack's action is but one more factor confining blacks to low-income housing in the center city, confirming the inexorable process whereby the St. Louis metropolitan area becomes one that has the racial shape of a donut, with the Negroes in the hole and with mostly whites occupying the ring . . ." *id.*

Since the proposed development "was particularly designed to contribute to the prevention of this prospect so antithetical to the Fair Housing Act" (*id.*), since there was ample proof that many blacks would live in the development and since the "exclusion of the townhouses would contribute to the perpetuation of segregation in a community which was 99 percent white" (*id.*), the Eighth Circuit de-

termined that the zoning decision violated §804(a) and §817 of the Fair Housing Act.*

D. This Court's interpretation of similar legislation with similar provisions shows that the complained-of action violates the Fair Housing Act.

This Court has yet to review an exclusionary zoning case under the Fair Housing Act. Its determination to construe similar remedial legislation in an expansive manner to effectuate the Congressional commitment to equal opportunity, however, strongly suggests that the Attorney General and the Eighth Circuit are correct in interpreting §804(a) and §817 to prohibit petitioners' obstruction of Lincoln Green. In *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (19....), for example, a unanimous court invali-

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* In both *Black Jack* and *Lackawanna, supra,* the Attorney General, who has enforcement responsibilities under the Act in certain circumstances (see 42 U.S.C. §3613), successfully argued that §§ 804 (a) and 817 should be construed in precisely the fashion suggested by respondents here. In *Lackawanna,* for example, the United States intervened in a challenge to a municipal zoning action which had prevented a low and moderate income housing development from being built in a white area, and took the position that:

> . . . [t]he contention that this is not an "interference" case within the meaning of 42 U.S.C. 3617 loses all force. The city interfered with and prevented the implementation of the plan which would have allowed a racially integrated housing development in a white area, and, if it is shown that this was on account of race or color (either through purpose or effect), an interference case is established. By the same token, the city made dwellings unavailable to Negroes within the meaning of 42 U.S.C. 3604(a) for, were it not for the city's action, the land would have been obtained and in all probability the homes would have been constructed. What needs to be proved—and, in our view, has been proved—is that the actions were discriminatory. (Brief for the United States at 29-31).

dated a job test that excluded a higher proportion of blacks than whites from access to employment opportunities by construing the Equal Employment Opportunity Act (Title VII of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000 *et seq.*) to require the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Id.* at 431. Title VII was not to be limited to racially-explicit classifications alone. "The Act prescribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* Indeed, "good intent or absence of discriminatory intent does not redeem employment practices or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432. See also *McDonnell Douglas Corp.* v. *Green,* 93 S.Ct. 1817, 1823 (1973), where Justice Powell wrote that the purpose of Title VII is "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens" and noted that "Griggs . . . deals with . . . devices which however neutral on their face operate to exclude many blacks." *Id.* at 1826.

The operative language of the Fair Housing Act and the Equal Employment Opportunity Act are virtually identical in describing the discriminatory practices that they prohibit. §804(a) makes unlawful housing practices performed "because of race." Title VII prohibits employment practices performed "because of an individual's race." (42 U.S.C. §2000e-2(a) (1) and (2)). This Court

in *Griggs* ruled that Title VII prohibits the use of employment tests that disproportionately exclude blacks from job opportunities, since they discriminated against blacks "because of . . . race." The same language in Title VIII should be similarly construed to prohibit housing practices that exclude minorities from desegrated housing opportunities and that create the "built-in headwinds" and "racially-stratified . . . environments" that in the employment field are no longer permissible.*

In summary, then, the language and legislative history of the Fair Housing Act, its interpretation by the courts and the Attorney General, its administrative and judicial interpretation and judicial construction of similar civil rights legislation mandate a conclusion that §§ 804(a) and §817 invalidate petitioners' decision to prevent construction of Lincoln Green since the decision denies minorities desegregated housing opportunities in an all-white area without compelling public justifications.

III.

ALL OF THE RESPONDENTS HAVE STANDING BECAUSE THEY HAVE A SUFFICIENT STAKE IN THE OUTCOME OF THE LITIGATION.

This Court held in *Trafficanti,* the words of the Act showed "a congressional intention to define standing as

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* Just as Title VII was designed to "achieve equality of employment opportunities, *Griggs,* 401 U.S. 424, 429, so Title VIII was designed to insure equality of housing opportunities. Indeed, under the facts here and in similar exclusionary zoning cases such as *Black Jack* that dramatically demonstrate how access to growing numbers of jobs may turn largely upon access to desegregated suburban housing, it would defeat the purposes of Title VII if the Fair Housing Act were held inapplicable here, since not only would minorities' opportunities to live in Arlington Heights be prevented, but their chances of working there would be limited as well.

broadly as is permitted by Article III of the Constitution." 409 U.S. at 209. Petitioner did not present the question of standing to the Court of Appeals for review, and, accordingly, the Court of Appeals did not consider the issue. This Court generally does not consider issues neither raised nor considered by the Courts of Appeals. See *e.g., Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144, 147, n. 2 (1970) and cases cited. In any event, all of the respondents have standing; numerous exclusionary zoning cases establish that both the corporate and individual respondents here have a sufficient stake in the outcome of this litigation to make them proper parties. *E.g., Park View Heights Corp.* v. *City of Black Jack*, 467 F. 2d 1208, 1212-1214 (8th Cir. 1972); *Kennedy Park Homes Ass'n.* v. *City of Lackawanna*, 436 F. 2d 108, 111-112 (2d Cir. 1970), *cert. denied.*

A. The individual respondents have standing.

The individual respondents are minority citizens of the United States unable to find housing they could afford in Arlington Heights (see, *e.g.*, Tr. 220-2). They would be eligible for Lincoln Green. (see, e.g. Tr. 43-44; Ps. Ex. 24 (Ex. B); and Tr. 207-208). Under *Warth* v. *Seldin*, 45 L. Ed. 2d 343 (1975) they have standing to sue since "absent the (petitioners') restrictive zoning practices, there is a substantial probability that they would be able to . . . lease in (Arlington Heights) and that, if the court affords the relief requested, the asserted inability of (respondents)

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* Petitioners assert, without record reference, that "the trial court found (that) Ransom and Guthrie are not even proper parties to this action." (Brief 46). The trial court made no such finding, but rather adjudicated their substantive rights and thereby treated the two as proper parties.

would be removed." *Warth*, 45 L. Ed. 2d 343, 358. Unlike the *Warth* plaintiffs whose inability to live in Penfield stemmed not from an unavailability of low and moderate income housing, which they could not afford* (except for Reyes, whose income was too high; see *Warth* at 359, n.16), but from the "economics of the area housing market" which prevented the construction of housing they could afford, the inability of the individual respondents in the instant case to live in Arlington Heights stems directly from the fact that the petitioners have interfered with the private housing market and prevented the construction of Lincoln Green.

B. MHDC has standing.

Respondent MHDC also has standing. It can assert its own rights, since it is being directly harmed by petitioners' conduct. Its corporate purpose is to build low and moderate income housing, and the petitioners are directly frustrating that purpose. It has also expended over $38,000 on the proposal.

It also has standing to raise the rights of the potential tenants, since they are being harmed by petitioners' conduct. See *Park View Heights*, 467 F. 2d 1208, 1213-14; *Lackwanna*, 436 F. 2d 108, *cert. denied*, 401 U.S. 1010; *Dailey*, 425 F. 2d 1037, ...; and *Sisters of Providence*, 335 F. Supp. 396. This Court has held in a number of housing cases that the provider of housing has standing to raise the interests of the black customer of the housing when the provision is being interfered with. See *Sullivan*,

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* There was no indication that they "had the resources necessary to acquire the housing available in the projects" which may have been built, *Warth* at 359, n. 16, since there was "not the slightest suggestion that they would be adequate, and of sufficiently low cost, to meet the petitioners' needs," *Warth* at 359, n. 15.